

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON**

A.E. and E.W.

Plaintiffs,

v.

**Civil Action No. 3:17-cv-01885
Judge Robert C. Chambers**

**JOSHUA NIELD; CITY OF
HUNTINGTON, WEST VIRGINIA; and
JOHN DOES 1-7, INDIVIDUALS,**

Defendants.

**WEST VIRGINIA DIVISION OF JUSTICE AND COMMUNITY SERVICES'
RESPONSE TO PLAINTIFF'S MOTION TO COMPEL RESPONSE
TO PLAINTIFF'S SUBPOENA**

COMES NOW, the West Virginia Division of Justice and Community Services/West Virginia Law Enforcement Professional Standards Subcommittee ("LEPS"), by counsel, Briana J. Marino, Assistant Attorney General for the State of West Virginia, in response to "Plaintiffs' Motion to Compel the West Virginia Division of Justice and Community Services to Respond to Plaintiffs' Subpoena" and states as follows:

1. On December 6, 2018, Plaintiffs served a "Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action" upon LEPS requesting the production of "any and all records in your files or databases pertaining to Joshua Nield [.]". A true and accurate copy of the Subpoena served upon LEPS is attached as Exhibit A to Plaintiff's Motion to Compel.

2. The individual who typically fields subpoena requests for LEPS was hospitalized for a serious illness which delayed LEPS' response to the lawfully issued subpoena. Upon learning of the subpoena's existence and due date, William R. Valentino, Deputy General

Counsel for the West Virginia Department of Military Affairs and Public Safety, reached out to Plaintiffs' counsel as indicated in Plaintiffs' motion. Further, undersigned counsel also reached out to Plaintiffs' counsel to facilitate disclosure of the documents upon being notified by Mr. Valentino of the subpoena.

3. Upon receipt and review of the documents in the possession by LEPS by undersigned counsel, Plaintiffs' counsel was again contacted to discuss the highly-sensitive nature of the documents in possession of LEPS to facilitate the quick but lawful disclosure of the information requested in the subpoena. A substantial portion of the materials requested to be disclosed by the Plaintiffs is protected information pursuant to state and/or federal privacy laws, including, but not limited to the Health Insurance Portability and Accountability Act. Accordingly, a release or agreed order was sought from the parties by Plaintiffs' counsel.

4. Being unable to disclose the requested information in the absence of (1) permission of Defendant Joshua Nield, or (2) receipt of a court order given the content of the information, LEPS encouraged Plaintiff to file its motion to compel in this case for the Court to address the privacy issues created by the subpoena due to the documents' contents. LEPS does not have the authority under either state or federal law to unilaterally disclose the information requested by Plaintiffs in response to the subpoena.

5. A detailed review of the documents in possession of LEPS revealed the following protected and/or confidential information is included within the broad scope of the documents requested by Plaintiffs via subpoena:

- a) Social security numbers;
- b) Birth dates of Defendant Nield and others;

- c) Cell phone records, including, but not limited to, photographs,¹ contacts,² text messages,³ and calendar entries;
- d) Personally identifiable health information, such as examination reports by physicians, test results, etc.;
- e) Home addresses and contact information related to Plaintiffs;
- f) Home addresses and contact information for individuals believed to be related to Plaintiffs; and
- g) Sworn statements and other investigatory materials which may not be subject to disclosure pursuant to the West Virginia Freedom of Information Act.

6. LEPS respectfully seeks an *in camera* review by the Court of the materials in its possession for decision by the Court regarding what materials may be produced to the parties unredacted, what materials may be/must be redacted, and what materials, if any, should remain confidential and undisclosed. Further, LEPS respectfully requests this Court to make any and all necessary findings required to facilitate any court-ordered disclosure of documents pursuant to the Health Insurance Portability and Accountability Act, West Virginia Code §27-3-1 (2018), and any other state or federal privacy laws which may be applicable to this information. LEPS stands ready to provide the Court all documents in its possession regarding Defendant Nield under seal.

7. In the alternative, LEPS respectfully seeks entry of an order making any and all necessary findings required and ordering LEPS to produce to the parties an unredacted copy of

¹ Upon review of the cell phone records, it is believed that the photographs contained therein is a mixture of professional photographs taken pursuant to Defendant Nield's official duties and personal photographs. Upon information and belief, personal photographs include, but are not limited to, photos of Defendant Nield's children and teammates of his children that play on baseball/softball team(s) with his kids. Identities of the minor children are unknown to LEPS in order for LEPS or Plaintiffs to seek permission from parents/guardians for the photos to be provided pursuant to the subpoena.

² Including, but not limited to, family members of Defendant Nield.

³ Including, but not limited to, family of Defendant Nield, such as his wife.

the documents in its possession pursuant to the Health Insurance Portability and Accountability Act, West Virginia Code §27-3-1 (2018), and any other state or federal privacy laws which may be applicable to this information. Upon receipt of an order of the Court directing it to do so, LEPS stands ready to make a timely disclosure of documents to Plaintiff in this case.

8. Should the Court believe that any hearing is necessary on this matter, the undersigned counsel is available at the Court's convenience.

WHEREFORE, West Virginia Division of Justice and Community Services/West Virginia Law Enforcement Professional Standards Subcommittee respectfully requests that an *in camera* review of the documents in possession of LEPS be conducted by the Court, and the Court enter an Order directing what documents, redacted or unredacted, be produced to the parties with all necessary findings under applicable privacy laws, together with such other or further relief as the Court deems necessary and appropriate.

WEST VIRGINIA DIVISION OF
JUSTICE AND COMMUNITY
SERVICES/ WEST VIRGINIA LAW
ENFORCEMENT PROFESSIONAL
STANDARDS SUBCOMMITTEE,

By Counsel.

PATRICK MORRISEY
ATTORNEY GENERAL

s/Briana J. Marino
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Defendants.

CERTIFICATE OF SERVICE

I, Briana J. Marino, Assistant Attorney General, hereby certify that on January 2, 2019, I electronically filed the foregoing *West Virginia Division of Justice and Community Services/West Virginia Law Enforcement Professional Standards Subcommittee* with the Clerk of the Court using the CM/ECF system, and mailed a true copy of same, United States Mail, postage prepaid, to the following:

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